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Commercial Arbitration in Argentina

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COMMERCIAL ARBITRATION IN ARGENTINA

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I. INTRODUCTION

Arbitrable disputes in Argentina are those in which the law provides for the possibility of a settlement (*transacción*); in other words, rights which the parties may freely dispose of are at stake. Broadly described, these are rights of a patrimonial nature. Thus, disputes involving the legal capacity and civil status of physical persons cannot be submitted to arbitration, nor can those regarding the validity of a marriage, nor those relating to *patria potestas*, *i.e.*, legal status of a family. However, many patrimonial issues deriving from those disputes may be submitted to arbitration. Also ineligible for arbitration are disputes involving matters outside of commerce, rights that cannot be freely disposed of by contracts, and questions where matters of public policy (*orden público*) are at stake.

Although in principle any matter which can be subject to contract may be submitted to arbitration, the prevailing view is that arbitral clauses should be narrowly construed. When the parties disagree as to whether a dispute may be arbitrated, it has been held that the dispute should be submitted to the courts. The rationale for this approach is that arbitral jurisdiction applies by way of exception.

With regard to international arbitration, Argentine law expressly allows the extension of national jurisdiction to judges or arbitrators acting outside of the country. However, two conditions are imposed: a) that the subject matter of the dispute must not be one over which Argentine courts have exclusive jurisdiction; and b) that the parties' agreement must precede the facts resulting in the intervention of foreign courts or arbitral tribunals. This principle is consistent with the Montevideo Treaties of 1889 and 1940, and with the Brussels Convention of 1952 (all of which were ratified by

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Argentina). Specifically, Argentine maritime law (*Ley de Navegación*) provides for the possibility of arbitration proceedings after the event causing the need for adjudication has taken place.

An examination of Argentine law governing commercial arbitration reveals that it is governed by the codes of civil and commercial procedure promulgated by each province and applied by the federal courts. Also, although they are not actually laws, the arbitral rules of the Buenos Aires Stock Exchange and the stock exchanges of the provinces may come into play. The following is a brief discussion of the law of arbitration in Argentina pursuant to the Federal Code of Civil and Commercial Procedure ("C.P.C.").

II. Types of Arbitration

Arbitration can be voluntary or compulsory. The former arises from an arbitral clause in an agreement between the parties that may be a part of the contract or entered into at a later point in time. The latter is imposed by law in matters related to commercial transactions, such as credit card disputes, improvements in the leasing of buildings, the price to be charged for certain services, among other things.

Another distinction lies between *de jure* arbitration and the *amiable composition. De jure* arbitration is governed by the codes of civil and commercial procedure, while the *amiable composition* is carried out without being subject to procedural norms, and the rules of law are applied only when the parties have specifically referred to it in their agreement. The C.P.C. and its counterparts in the provinces make a very clear distinction between *de jure* and the *amiable composition.* In *de jure* arbitration, the arbitrators are veritable private judges who must adjudicate the case pursuant to the procedural rules and the applicable substantive law. In contrast, *amiables compositeurs* are not required to adjudicate pursuant to rules of law and are expected to decide according to the best of their knowledge and belief. In other words, the award may be based on general principles of equity so long as the proceedings do not violate the basic constitutional guarantee of due process (the concept of due process is equally applicable to arbitration and the judicial process). The law provides that in case of doubt as to the nature of the arbitration agreed to by the parties, it will be presumed to be one of *amiable composition.*

There is a specific method of dispute resolution that should

not be confused with arbitration. Argentine law provides for a trial by experts (*juicio pericial*) where only questions of fact are in dispute. The experts are generally known as "expert arbitrators" (*peritos árbitros*) because of their knowledge of the specific matter at stake. They assist the judge in the findings of fact, but it is up to the judge to apply the law and settle the case. This trial of experts lies within the framework of ordinary judicial proceedings and is limited to issues of fact.

III. Enforcement of the Arbitral Clause and the Submission

To understand the terminology used in Argentina, two concepts must be differentiated. The "arbitral clause" (*cláusula compromisoria*) is an agreement between the parties by which they submit their future disputes to arbitrators. This clause may be in the original contract, or in a subsequent agreement. As long as the intent of the parties is clear, it is not necessary to indicate in the arbitral clause either the specific issues to be decided, the procedure to be followed in the arbitration, or the method of appointment of the arbitrators.

In order to provide for compulsory arbitration, the arbitral clause must be coupled with the submission (*compromiso*), which is a subsequent agreement in which the parties appoint the arbitrators and submit to them the issues to be decided. The submission must be signed by all parties and is subject to nullification if the following points are not included: the date, the names and addresses of the parties and the names and addresses of the arbitrators. If a third arbitrator is to be appointed, he may be appointed by the other two arbitrators. If the parties do not agree as to the third arbitrator, or as to the first two, or if the first two arbitrators fail to agree on the appointment of the third, then a judge will appoint them. The submission must also include the specific issues to be decided, as well as a penalty to be paid by the party which fails to carry out the steps indispensable to the performance of the arbitral clause. The submission may refer to the procedural rules governing the arbitral proceedings, or indicate the place of arbitration, the due date for rendering the award, the appointment of a secretary of the arbitral tribunal, the waiver of the right to appeal, among other things.

IV. Refusal of One of the Parties to Execute the Submission

If one of the parties, after signing the arbitral clause and after the dispute has arisen refuses to execute the submission, it is necessary to file a suit requesting that the judge execute the submission on behalf of the recalcitrant party.

There have been cases in which one of the parties has refused to execute the submission alleging that the other party has defaulted in one of his or her obligations arising from the agreement containing the arbitration clause. This defense, generally known in contract law as *exceptio non adimpleti contractus*, has been rejected by the courts. Courts have held this defense to be inapplicable because the arbitral clause is entered into precisely for the purpose of arbitrating disputes arising from the main contract, including the issue of whether or not one of the parties has failed to perform any of his obligations.

V. Termination of the Submission

Before entering into a discussion of the arbitral proceedings, one should look at the law regarding the eventual termination of the submission. The C.P.C. lists the following grounds for termination of the submission: the agreement of the parties is formalized in the same manner as the submission; the parties decide to submit the dispute to the courts; the time in which to render the award has expired and, therefore, the mandate of the arbitrators has terminated; the death or incompetence of the arbitrators, although the parties may then choose to appoint a substitute arbitrator; and the mootness of the subject matter of the arbitration.

VI. Composition of the Arbitral Tribunal

Once the arbitral clause has been formalized in a submission, the arbitrators are appointed. The arbitrators must be physical persons, not only because it is provided by law, but because any legal entity appointed as arbitrator must then appoint in turn a legal representative to serve as arbitrator. They should also be capable persons, although a college degree or a special technical training is not required.

The competence of the arbitrators appointed by the parties or

by a court may be subject to challenge, and the appointed arbitrators may themselves abstain from intervening. It should be noted that judges may serve as arbitrators in those cases where the federal or provincial government is a party, in which case they are not entitled to a fee. The arbitrators appointed by the parties as well as other officers, such as the secretary of the arbitral tribunal and the lawyers for the parties, have a right to be paid. A judge assesses their fees after the rendering of the award.

VII. Conduct of the Arbitral Proceedings

Once the arbitrators have taken office (by oath in the case of *de jure* arbitrators), they shall appoint a president of the arbitral tribunal from among themselves, who will be in charge of the proceedings and of the interlocutory arbitral rulings. Unless the parties agree otherwise, a secretary shall be appointed by the parties or by a judge. This is not required in the *amiable composition.*

All the procedural rulings, except minor ones, must be rendered by the arbitral tribunal jointly; if one of its members fails to consent, the arbitral tribunal is deprived of jurisdiction and the arbitral ruling is null and void. The function of the third arbitrator is limited to deciding a tie vote on issues in which the first two fail to agree. The absence of one of the arbitrators due to his or her refusal to convene does not result in the nullification of the arbitral proceedings. In such a case, the arbitral tribunal may deliberate and decide by majority vote. In case of a tie, the parties or the judge must appoint a third arbitrator, whose mandate is strictly limited to the settlement of the tied issue.

If the parties have failed to indicate the rules of procedure to be followed, the arbitral proceedings shall be conducted pursuant to the rules of procedure applicable to plenary or summary proceedings (*juicios ordinarios o sumarios*) based on the nature and amount of the case. This does not apply to the *amiable composition*, which is not subject to rules of law. The rules applicable to the arbitral proceedings in *de jure* arbitration are those applicable to judicial proceedings in commercial and civil matters. If the arbitrators lack jurisdiction to take a given measure, they must request the assistance of the courts.

VIII. The Rendering of the Award

Once the record of the arbitral proceedings has been duly examined, the arbitrators must render the award. The award must expressly settle all the issues submitted to arbitration, including issues derived from those specified by the parties. The award must be issued within the time limit provided by the parties or the judge. The arbitrators may obtain from the judge an extension of time for reasons other than their own neglect or fault. The parties may, of course, agree on a postponement. Otherwise, rendering the award beyond the given time limit would provide the parties the right to petition to set it aside, because the arbitrators no longer had jurisdiction to render the award.

There are no express rules concerning the format of the award, so rules applicable to judgments rendered by the courts are applied by analogy. Accordingly, the award must state the reasons upon which it is based.

Awards rendered by *amiables compositeurs* may be set aside if the time limit to render the award has expired or if the award addresses matters outside the scope of arbitration. An award rendered by *amiables compositeurs* may not be set aside on the grounds of errors of law, but such errors may be a basis for challenging an award rendered by *de jure* arbitrators.

IX. Challenge of the Award

The parties may waive their right to appeal and to request that the award be set aside. However, if they do not waive the right to appeal, a distinction must be made between the award rendered by *de jure* arbitrators and *amiables compositeurs*. The former may be appealed on the same grounds as ordinary judgments, but the latter can only be set aside on the grounds mentioned above. In my opinion, however, awards rendered by *amiables compositeurs* may also be set aside if one of the parties' due process rights were violated or if the defendant did not have a fair opportunity to present his or her case.

Another distinction between *de jure* arbitration and the *amiable composition* lies in the appropriate tribunal for the appeal. Whereas an appeal of awards rendered by *de jure* arbitrators must be decided by a court of appeals, an appeal of an award rendered by *amiables compositeurs* must be decided by a judge of first

instance.

X. Enforcement of the Award

The arbitrators lack the power to enforce the award and, as a consequence, the arbitral award must be enforced by the courts. Therefore, if an award is not honored by the parties, it must be submitted to a court together with the arbitration agreement. The award shall be enforced as a judgment rendered by the courts. Foreign arbitral awards must comply with the formalities required by the laws of the country where they were rendered and with those required by Argentine law.

XI. Arbitration in the Stock Exchange

As previously stated, the codes of civil and commercial procedure are not the exclusive sources of arbitration law. For example, the arbitration system developed by the Buenos Aires Stock Exchange is not based on the codes and is used in various stock exchanges and markets in the provinces.

Arbitration is particularly important in commercial transactions. In the Italian tribunals of the Middle Ages, merchants settled their disputes without the intervention of the courts of law. This practice no longer prevails, but the specialty and urgency of commercial disputes are not easily settled through the formality of civil procedure. Thus arbitration is rapidly making significant inroads in stock exchanges and similar institutions. This trend is illustrated by the excellent results achieved by the arbitral rules of the General Court of Arbitration of the Buenos Aires Stock Exchange ("General Court of Arbitration").

The General Court of Arbitration is composed of three permanent members and a secretary, each of whom must have a university degree. Two of the three arbitrators must be lawyers. Aside from its function as a court of appeals for the remaining courts of arbitration, the General Court of Arbitration has the authority to rule on any question that arises from a commercial contract and is submitted by the parties, whether or not the parties are members of the Stock Exchange and the contract in question was registered there.

The General Court of Arbitration's procedural rules are not subject to the rules of the codes of civil and commercial procedure.

Although the members of the General Court of Arbitration serve as *amiables compositeurs*, the awards are thoroughly supported by law. By submitting a case to this arbitral tribunal, the parties waive their right to resort to any other court, the right to appeal, and their diplomatic immunity, if applicable.

XII. The Practice of Arbitration in Argentina

The economic and business reality of Argentina is partially responsible for the infrequent use of arbitration. Chronic inflation has gripped Argentina for many years and has had an impact on the use of arbitration.

As elsewhere in Latin America, the interest rates in Argentina are compound. Interest rates cover fluctuations in the value of money and attempt to compensate for the money's lack of use. The amount which attempts to compensate for the lack of use is the real interest, or "net interest." For many years, the monthly net interest rate has been very high, specifically, from two and one-half percent to five percent per month (not including accumulation for annual investments). In contrast, money judgments require the payment of: a) the nominal capital; b) the adjustments which change its value due to inflation; c) an interest fee; and d) the costs and expenses of the trial to be paid by the losing party.

In varying degrees according to the courts and provinces, interests on amounts previously adjusted to inflation vary between six percent and fifteen percent per year, in most cases eight percent. At best, the legally recognized interests do not even cover half of the interests yielded by the money invested without risk in the financial market. Any potential debtor who faces litigation has the option of submitting the dispute to the courts, where ordinary proceedings last about two years, or submitting the case to arbitration, where in a maximum of six months the matter is likely to be resolved.

Therefore, the financial option is to pay the eventual debt within six months, including real interest, or to pay it two or three years later, thus obtaining the additional benefit of disposing of the money at a reduced interest rate. Except for the potential debtor who acts according to strict ethical standards, or who has discovered the value of a good business reputation, most will prefer to profit at the expense of their creditors, in spite of having to pay the costs of the trial. A debtor benefits from the inflation in a two

year trial despite the eventual payment of court costs and expenses.

This economic reality has resulted in the rare use of arbitration. As long as passive bank interest rates remain high and judicially recognized interest rates are not even half the level of the bank interest rates, very few people in business will be willing to expedite the legal process through arbitration. But, because parties cannot be absolutely sure of winning or losing, a trend is likely to develop to replace litigation with alternative methods of dispute resolution.